TESTIMONY BEFORE THE HOUSE RESOURCES COMMITTEE ON HR3824
THE THREATENED AND ENDANGERED SPECIES ACT OF 2005
BY GARY J. TAYLOR, LEGISLATIVE DIRECTOR

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES
September 21, 2005

Thank you, Mr. Chairman, for the opportunity to appear before you today to share the perspectives of the International Association of Fish and Wildlife Agencies (IAFWA) on the Endangered Species Act, particularly the role of the State fish and wildlife agencies in implementing the Act, and for the opportunity to provide comments from our preliminary review of HR3824 the bill which you just introduced on Monday. I am Gary Taylor, Legislative Director of the International Association of Fish and Wildlife Agencies, and we look forward to working with you and Committee staff as HR3824 matures through the legislative process

We agree with many of the goals and objectives of HR3824, although we are still analyzing the full details of the bill in comparison to the IAFWA General Principles for ESA Reauthorization, which are attached to this statement. We are encouraged by the emphasis on recovery and the provision of certain landowner incentives but, again, need to fully understand the details of the bill. We appreciate that HR3824 proposes two legislative remedies which would enhance the role of the states, and we would sincerely encourage your serious consideration of an even greater role for the states in several other areas I will address later. There are also some proposals in the bill, such as compensating landowners for forgone use, which we do not support since they are not consistent with established Association policy. In other areas, as Section 7 consultation changes, we prefer to comment later following further review. One final general observation, Mr. Chairman, is that with the addition of the more sophisticated process contemplated by HR3824 much more robust Congressional appropriations will be required in order to satisfy the requirements of this bill.

The International Association of Fish and Wildlife Agencies was founded in 1902 as a quasi governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of the states, provinces, and the federal governments of the U.S., Canada, and Mexico. All 50 states are members. The Association has been a key organization in promoting sound resource management and strengthening federal, state, and private cooperation in protecting and managing fish and wildlife and their habitat in the public interest.

The Association affirms that the Endangered Species Act has been and must continue to be a vital conservation tool for protecting threatened and endangered species and their habitats. However, the Association recognizes that improvements are needed in the design and statutory basis of the Act, and in its implementation and administration.

Since passage of the ESA, the State Fish and Wildlife agencies have identified what works and what does not work in meeting the goals of the Act, and have through extensive discussion and dialogue over the past 15 years, arrived at a set of recommendations for necessary statutory amendment or other reform through policy or regulation. As previously indicated, these recommendations (IAFWA: Reauthorization and Reform of the Endangered Species Act: General Principles, September 30, 2004") are included as an appendix to my testimony. The ESA must be streamlined for efficiency, amended to ensure increased authority and responsibility for States, and reformed to provide increased certainly and technical assistance for landowners and water user.

The State fish and wildlife agencies objectives are very straightforward: 1) to successfully carry out our responsibility as public trust agencies to ensure the vitality of our fish and wildlife resources for present and future generations; and 2) to encourage, facilitate and enhance the opportunities, means and methods available to all citizens and especially landowners in our states to contribute to meeting this conservation

objective in cooperation with our agencies and our federal counterparts. Much of this involves solving problems and reconciling differences, and we believe any ESA bill should provide new and useful tools, opportunity and direction to achieve both of these objectives.

Let me now reflect on the need for reaffirmation and enhancement of the role of the state fish and wildlife agencies in ESA implementation. State fish and wildlife agencies are particularly interested in having a greater role in listing decisions and in on the ground efforts to recover listed species.

First, we believe that any ESA bill must restore Congressional intent that reflects and respects the authorities, role and responsibilities of the state fish and wildlife agencies in fish and wildlife conservation in general, and listed species in particula r, through the Section 6 language which says that “In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States”. We firmly believe that reaffirming the role of the State fish and wildlife agencies in all aspects of the ESA to reflect our concurrent jurisdiction over listed species sets the stage for more efficient and effective administration of endangered species programs.

The State fish and wildlife agencies have broad statutory responsibility for the conservation of fish and wildlife resources within their borders, including on most Federal public lands. The states are thus legal trustees of these public resources with a responsibility to ensure their vitality and sustainability for present and future citizens of their States. State authority for fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law. State fish and wildlife agencies must be given the opportunities to be fully involved in every aspect of the Act, from consideration of listing petitions to de-listing through meaningful recovery plans. With appropriate and adequate funding, states are in the best position, exercising their expertise and relationships with landowners, other governments, etc., to more fully engage in implementation of the ESA.

Further, we believe any ESA bill must restore Congressional intent for a statutory distinction between “threatened” and “endangered” status. The Executive branch agencies have blurred this distinction to a point where there is de facto no difference. Congress intended the distinction, and specifially prescribed different statutory obligations and liberties. The flexibility of this distinction needs to be restored as a tool for appropriate use by the resource agencies. A careful reading of section 6 of the ESA and its legislative history will conclude, we believe, that Congress originally intended he states to be the lead in threatened species recovery, as long as they qualified under an approved section 6 cooperative agreements. However, an ill – advised USDI Solicitor’s opinion regarding section 6, combined with a blanket rule (50 CFR17.31) promulgated by the FWS that presumptively extends the take prohibition to threatened species unless a less restrictive specific 4(d) rule is developed, minimizes the utility of the threatened status and the potential for state lead in threatened species conservation. We appreciate that some clarity on this issue has been provided in HR3824. A section has been added to Section 6 cooperative agreements, to provide for incidental take to be covered in the agreement. The language on P.38, Line 20 could be clearer if reference was made to apply to all covered species instead of “such species” which might be construed to reference only incidental take of candidate species. Further, the added provisions in Section 6 (P.38, Line10, etc.) provides a program for candidate species, a category not defined in ESA. Candidate is defined in 50 CFR 424.02 as “any species being considered by the secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule”. The regulations are clear that “none of the substantive or procedural provisions of the Act apply to a species that is designated as a candidate for listing. 50 CFR 424, 15(b). If a third category of species is being contemplated by this bill, a definition of candidate species should also be included in the bill.

The Association strongly urges Congress to clarify it’s original intent that the States may, under an “approved full authorities cooperative agreement” with the United States Fish and Wildlife Service (Service) incorporate endangered and threatened species “take” provisions into their conservation programs. Unfortunately, over the last thirty years, certain administrative actions have been put in place that we believe are contrary to Congress’ original intent for the Act. These practices have tied the hands of the State government agencies in being full partners with the Service and have undermined the authority of State government agencies to manage their resident fish and wildlife populations. Although not required by the terms of Section 6 of the Act, it has become the practice for the federal government, through the Service, to control the process to permit regulated “take” of listed species. A plain reading of the Act and examination of legislative history assumes that States which are parties to “full authorities” cooperative agreements will establish their own implementation process, so long as the process conforms to the requirements for approval by the Service. Through this Section 6 process, the State is implementing provisions of the federal ESA, not just implementing its own State conservation program. Such an agreement is still subject to

Section 7 consultation and must also comply with NEPA.

A 1977 Memorandum of a USDI Assistant - Solicitor stated that Section 6(f) of ESA imposes a federal "minimum floor" on State laws concerning taking of endangered and threatened species. Under this misreading of Section 6, (which isolates Section 6(f) instead of reading all sections of the ESA together) all permits for the "take" of endangered or threatened species have been determined to require issuance by the FWS and cannot be a part of a section 6 cooperative agreement with a State. A correct reading of ESA permits a State that follows the requirements set out in Section 6 to incorporate terms of "take" provisions in an agreement it may reach with the Service. We believe language in HR3842 does provide clarity to this matter but request that it be further clarified to ensure that it applies to all covered species under the agreement.

Further the ESA makes a clear distinction between species that are "threatened" and those that are "endangered". The Act provides for them in different ways, allowing more leeway for management flexibility for species that are threatened. However, the Service developed a blanket rule published at 50 CFR 17.31. This blanket rule imposed all of the applicable take provisions for endangered species on threatened species, unless the Service publishes a less restrictive rule for a particular threatened species. The blanket rule is often referred to as the "default setting".

Section 4(d) of the ESA permits the Secretary (Service) to issue necessary regulations for the conservation of threatened species. Section 4(d) requires the Service, to the greatest extent possible, to cooperate with the States that have entered into full authorities cooperative agreements in developing those rules. Congress intended the States to play a significant role in threatened species conservation. Congress stated this intent by giving the State the potential lead in developing Section 4(d) rules. This important component of the ESA has not been recognized by the States' Federal partner. This, in turn, has crippled State fish and wildlife agencies in their role to manage and protect threatened species. When a State's Section 6 cooperative agreement is silent as to Section 4(d) rules, the blanket "default setting" rule becomes applicable. All applicable take provisions for endangered species are imposed on threatened species. This is not the Federal and State management teamwork Congress intended. HR3824 begins to address this default setting by providing discretion to the Secretary regarding the promulgation of take restrictions to threatened species. The blanket or default setting presumption is eliminated. Further, the bill requires a species specific 4(d) rule. All of these points provide some clarity to the impact of a 4(d) rule.

Turning to the listing process, the Association concurs with the provision in HR3824 which requires the use of best available scientific data but we are concerned that administrative rulemaking that would establish standards for that could lead to even further litigation. As an alternative, the Association recommends that the state fish and wildlife agencies be institutionalized in the ESA in two particular listing process amendments:

Prelisting Data Collection and Reviews: State agencies have expertise in conducting population status inventories and geographic distribution surveys to facilitate review of which species should be advanced to the official proposed stage for listing consideration. The use of the states in this role in the 90 day review process would need to be amended into the ESA to address a recent federal court decision (Center for Biological Diversity v. Morganweck, CV-04-F-0108, D. Colo. (2004)) which directed the USFWS to not engage the states in the 90 day review of the listing petition. The USFWS and NOAA Fisheries can and should avail themselves of the States' expertise by contracting with (or by use of other means) the States to provide these data and analysis.

Presumption of State Information: If a determination is made that substantial information is submitted with a listing petition, the Secretary should be required to provide all listing petitions to the appropriate State fish and wildlife agency or agencies for review as HR3824 proposes. We recommend further, that there should be a statutory rebuttable presumption in favor of State information and recommendations on listing, which the Secretary could refute if the Secretary disagreed with the State recommendation, only through required use of formal peer review. The Secretary would, however, retain authority for the final decision regarding listing.

With respect to Recovery Plans, Congress needs to make these more meaningful with both incentives and obligations for all parties to the plan. HR 3824 is a step in the right direction, particularly with respect to financial incentives for private landowners to engage in conservation efforts identified in the recovery plan. However, with respect to other federal agencies, while HR3824 authorizes and allows the Secretary to enter into an agreement with other federal agencies to implement the plan, in the absence of such an agreement,

the recovery plan remains non-binding guidance. We encourage you consider providing further incentives such as expedited section 7 consultation for federal agency actions that are consistent with an approved recovery plan, in order to encourage other federal agency engagement. Meaningful recovery plans that are appropriately funded and implemented should be the blueprint for conservation of listed species, i.e. delivering on the ground what is necessary to bring those species to a point where the provisions under the ESA are no longer necessary.

We are encouraged that HR3824 begins to address the complex issue of delineating state-specific recovery goals and objectives, as a means of articulating both approaches to recovery and opportunities for delisting as recovery is achieved. The latter will, we believe, provide very strong incentives for states and local partners to take aggressive conservation action on behalf of wide-ranging species. Perhaps as no other species has, the sage grouse provides clear instruction on how state-by-state conservation, with full engagement by local partners, can result in rangewide progress.

HR3824 requires the development of criteria in the recovery plan identifying when species recovery is met but we strongly believe recovery plans must have a statutory trigger to compel the Secretary to initiate the down or de-listing process once population/habitat recovery objective are met. Further, the process to down or de-list needs to be expedited, which also requires a statutory change. The Secretary should be directed in statute to initiate the process for down or de-listing a species once the objective, measurable criteria as set forth in the recovery plans are reached.

The post de-listing monitoring obligations/process also needs revision - - it is too onerous and subject to too much federal agency discretion. For example, the states believe that biological recovery objectives for grizzly bear have long been satisfied but the Service has never settled on a post – de-listing monitoring plan and thus until very recently, held up a delisting proposal for this species. The same is true of the bald eagle. That is simply unacceptable and needs to be changed.

The Association recommends that Congress simply eliminate that part of the statute requiring federal approval of a post – delisting monitoring plan. Once delisted these species simply come back under the full and exclusive authority of the state fish and wildlife agencies; they don't fall off the jurisdictional radar screen. Guidance for developing post de-listing monitoring and other considerations can be part of the recovery plan. The Secretary would retain emergency authority to list a species under circumstances of precipitous decline.

Creating and implementing meaningful recovery plans will require both Congressional action in amending the ESA and as importantly, in appropriating adequate funding. We also recognize that it will require a significant shift in the focus and workload of the Service and NOAA – Fisheries in implementing the recovery plans, and in changing their budget focus from listing species and designating critical habitat to recovery emphasis. State fish and wildlife agencies should be given the opportunity to take the lead in developing and implementing recovery plans, and we see no provision authorizing that in HR3824. In fact, we note with concern that HR3824 appears to provide opportunity for the Service to bypass state fish and wildlife agency participation in recovery planning by authorizing the Service to enter into an agreement with private landowners to develop short and longer term recovery agreements. We strongly urge the addition of language affirming the states role in the full range of recovery planning and implementation. Since State Fish and Wildlife agencies are expected to play a significant role in drafting and implementing recovery plans, adequate funds will need to be made available to the states for that purpose.

With respect to the proposal in HR3824 which would eliminate the statutory requirement to designate critical habitat, the Association is in agreement with moving critical habitat to the recovery planning process and to remove the statutory mandate to designate. However we recommend that the Secretary be provided the discretion to designate critical habitat when needed because there may be instances where protections through designation are appropriate and prudent. The statute needs to be appropriately amended so that the Secretary's discretion over when and whether or not to designate critical habitat is clarified and broadened. State agencies should be equal partners with federal agencies in evaluating the need for critical habitat and the rule-making and decision making process for identification and designation.

Finally, let me highlight another of our general principles –preventative conservation. The Association reemphasizes that it is vitally important to secure funding (separate from ESA) for the States to provide for conservation programs for nongame fish, wildlife and their habitats in order to facilitate a conservation safety net before it is necessary to impose the ESA to prevent species extinction. If we can address the limiting factors causing a species decline before they reach a stage where the ESA is the only protection against

extinction, we can employ a series of voluntary, non-regulatory approaches that provide more flexibility and creativity for conservation programs with private landowners and other jurisdictional entities. This preventative management makes good biological and economic sense. However, emphasis on preventative conservation must be coupled with ensuring that the states' authorities in this area are not eroded through federal rulemaking under the ESA. As an example, when candidate species and other "at-risk" species are brought into federal ESA-based conservation agreements (e.g. Habitat Conservation Plans and Candidate Conservation Agreements). to which the state(s) may not even be a partner, if can serve as a strong disincentive for state conservation action.

We continue to urge Congress to look favorably on the dedication of funds from various potential sources (Outer Continental Shelf gas and oil royalties and leases; gas and oil royalties and leases from exploration and development on federal public lands; or other sources, that will be matched with state and private funds) to finance these state-based preventative conservation programs.

It is only through dedicated and assured funding that we can get out ahead of the curve of endangered species listing.

Thank you for the opportunity to share our perspectives and I would be pleased to answer any questions.

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

Reauthorization and Reform of the Endangered Species Act: General Principles

September 30, 2004 1

Introduction

The Association affirms that the Endangered Species Act (ESA or Act) has been and must continue to be a vital conservation tool for protecting threatened and endangered species and their habitats. However, the Association recognizes that improvements are needed in the design and statutory basis of the Act, and in implementation and administration of the ESA.

In 30 plus years of experience with the ESA, the State Fish and Wildlife agencies have identified what works and what does not work in meeting the goals of the Act, and herein provide recommendations for necessary amendment or other reform through policy or regulation. Significant reform could free up human and financial resources to serve more species, put more money on the ground, and allow more people to interact positively with rare or declining species. The ESA must be streamlined for efficiency, amended to ensure increased authority and responsibility for the States, and reformed to provide increased certainty and technical assistance for landowners and water users, for example:

a. The Association concludes, from member agency involvement in the application of the Act, that the Act provides some degree of discretionary flexibility. However, administration of the Act often results in regulatory approaches and judicial challenges that are forced upon the Federal agencies by special interest groups and which alienate local communities and result in the courts deciding how the Act is applied.

b. The Association opines that this era of "conservation through conflict" has been beneficial to neither the health of the species and habitats the Act seeks to protect, nor the Act itself. In fact, it erodes rather than builds public support essential to achieving the admirable goals of the Act. Recent Federal agency movement toward increased State and public participation in recovery planning should be enhanced, but must recognize and respect State authorities and responsibilities for planning on-the-ground delivery of collaborative conservation programs. The States are not just another voice to be heard in the public process; they have a primary responsibility for wildlife conservation.

---

1 Adopted by the Association at the March 1993 meeting in Washington, D.C.; revised, modernized and approved at the September 1995 meeting in Branson, MO; and updated and adopted at the September 2004 meeting in Atlantic City, New Jersey. This position paper is an evolving work, reflecting the best information available at the time of adoption, but subject to change as new issues and information arise. Although adopted by the International Association of Fish and Wildlife Agencies, and endorsed by Regional

Associations, each State reserves the prerogative to take its own position on issues of concern.

IAFWA Position Paper on ESA Reauthorization and Reform

September 30, 2004

c. The Association opines that federal agencies have not recognized or applied the statutory distinction provided for between the classifications of “threatened” and “endangered” or fully embraced the role of the states in threatened and endangered species recovery. This has compromised effectiveness of the Act.

d. Similarly, the lack of consistent definitions of recovery (e.g. in terms of population size and distribution), “significant portion” of a species range, and what constitutes historical range and constituent elements of critical habitat has lead also to compromised effectiveness of the Act, and unnecessarily prolonged debate as to which conservation actions will be given priority for funding and implementation.

e. The Association advocates and supports efforts to take ecosystem and broader (e.g. regional) approaches to management and recovery, and to apply the Act to “clusters” or “guilds” of species, as already allowed for under the Act. These approaches greatly enhance the utility of the Act, and improve both the efficiency and efficacy of the listing, critical habitat designation, and recovery processes. Listed and imperiled species sharing a common habitat often require compatible protection and recovery actions. Therefore, the agencies should, where appropriate, more frequently employ this means of conservation.

f. The Association appreciates recent changes by the Administration to provide incentives to State and private landowners through new funding programs; to provide regulatory protections for landowners that voluntarily do good deeds to aid endangered species under safe harbor, candidate conservation and state conservation agreements; and to provide certainty of protections under the “no surprises” and “PECE” policies and enhancement of survival permits. These changes improve the effectiveness of the Act, and the Association advocates that, along with the changes recommended in this document, these policies be established in law.

Guiding Principles and Recommendations for Reform

I. Preventive and Restorative Management

The Association reaffirms its commitment to prudent, proactive conservation of fish, wildlife, and the natural communities on which they depend, so the need to impose the rigors of the ESA for common species is minimized and to ensure that species in greatest conservation need are restored. We do not advocate avoiding application of the Act; rather, we advocate addressing species and habitat declines by cooperative prevention strategies before a crisis situation is reached, and benefiting multiple species by taking a coordinated, comprehensive, management approach once species are listed. Federal and State agencies and their partners must, where possible, anticipate impacts on species and habitats, and address those factors comprehensively (where feasible) and proactively, rather than by reacting to them. We must design remedies that restore the few, and benefit the many.

The ESA should and does play a crucial role as the necessary tool of last resort for protecting against extinction, but it also must work in concert with, and not against, other management actions. In concert with preventive management actions, the ESA could not only restore species undergoing precipitous declines, but also ensure that they persist and never need the protections of the Act again.

Federal and State conservation agencies must cooperate fully in coordinating application of the many existing Federal statutes relating to public lands management (NFMA, FLPMA, etc.), habitat conservation (HCPs, SHAs, CCAAs, SCAs, Critical Habitat), and project impact review (ESA Section 7, NEPA, etc.); comparable State laws (nongame and endangered species laws; habitat protection laws; and environmental review statutes and programs); and county and local land-use planning ordinances and programs. A more comprehensive integration of the relevant statutes at all levels would enhance their utility for conservation of fish and wildlife and their habitats, ensure sustainability of ecological communities, restoration of species at risk, and preclude the need to list other species.

Further, there needs to be a major thrust to adequately fund endangered species recovery efforts and (distinct from ESA reauthorization) to fund broader State/Federal programs for conservation of the vast majority of non-game fish and wildlife species that are currently receiving far less than adequate attention,

and thereby providing the means to prevent species from becoming endangered. Based programmatically on the highly successful Sportfish and Wildlife Restoration Programs under the Wallop-Breaux and Pittman-Robertson Acts, the fish and wildlife diversity funding initiatives of the past several years, which have been supported by IAFWA, all 56 fish and wildlife agencies among the States, and by a large and still-growing grass-roots coalition across the country, are intended to secure permanent, dedicated funding to provide among other things, for prevention of species imperilment, through development of comprehensive wildlife conservation strategies and provision of routine fish and wildlife management practices by the States and their conservation partners.

Finally, the Association encourages use of both legally binding State Conservation Agreements and inter- and intra-governmental agreements for candidate species and species of concern in lieu of listing them as candidate, threatened or endangered, where management actions specified under such Agreements can remove the threat(s) to the species. Broad, non-regulatory, landscape scale, comprehensive habitat-based agreements must also be encouraged. Clarification of the Endangered Species Act to recognize and support such cooperative agreements is required. Affirmation of State authority for non-listed species must be legislatively assured and the role of the State fish and wildlife agencies in this process must be institutionalized. By requiring the Secretary to concur with State-led conservation agreements involving affected jurisdictional entities and private landowners (where appropriate) that are determined by the Secretary to be adequate to address the needs of and recovery of declining or at-risk species, the Secretary will be legally shielded from a requirement to impose certain regulatory implications through suspension of the consequences of listing. Private landowners should be given legal assurances that, once they commit to certain responsibilities under such agreements, no additional liabilities will be imposed on them, unless by mutual agreement. The incentive for Federal agencies to participate is that they would incur no liability under Section 7 if actions to recover declining species were taken prior to listing.

II. The Role of State Fish and Wildlife Agencies

The Association advocates legislative assurance of the co-equal role of the State fish and wildlife agencies under the Act. Under the ESA, States share jurisdictional authority for listed species, which is executed through a cooperative agreement (ESA Section 6) with the U.S. Fish and Wildlife Service (USFWS) or the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries). And yet, the State fish and wildlife agencies are often not adequately included in the implementation of the Act. The States, where they have the fiscal resources, expertise, staff, and political support to do so, should play a much greater role in administration of the Act with the USFWS and NOAA Fisheries. The Section 6 Cooperative Agreement should be redesigned to function as a true partnership agreement between and among the States, USFWS, and NOAA Fisheries, requiring close collaboration, coordination, and mutual agreement on implementation of all aspects of the Act. The Section 6 agreement can be the vehicle to identify the respective roles of the States and federal agencies. It should provide the flexibility to allow States that so chose to assume the lead for, or total assumption of, aspects such as pre-listing conservation, recovery planning and implementation oversight, SHA and HCP administration, delisting responsibilities, and post-delisting monitoring. Even when States do not take the lead, their involvement should be co-equal with the Federal agencies. States should also be given the financial resources to assume an expanded role in ESA administration and implementation.

There should be coordinated joint rulemaking and decision-making processes between and among the USFWS, NOAA Fisheries, and the State fish and wildlife agencies for administrative and regulatory actions. In the rare cases where the States, USFWS, and NOAA Fisheries cannot reach agreement on administrative, regulatory, and implementation actions, the respective Secretaries of Interior or Commerce should have the final decision to resolve disagreements.

The role of the State fish and wildlife agencies in coordination/co-administration of the Act with the Federal agencies must not be subject to the Federal Advisory Committee Act (FACA), since the States share jurisdictional authority with USFWS and NOAA Fisheries for listed species. It is simply not appropriate for the day-to-day cooperation between the States and Federal agencies to be subject to FACA. Thus, the ESA must be amended to ensure that FACA does not apply to any aspect of State participation in all aspects of the ESA.

III. Listing

The Association contends that other features of the Act, such as the recovery plan process, should provide sufficient latitude for balancing or harmonizing the needs (socio-economic) of mankind, without changing the

listing process itself to embrace those issues. Listing should be decided based solely on biology, and States should be equal partners with the federal agencies in petition evaluation, data review, rule-making and decision-making for all listing, downlisting and delisting actions.

The State fish and wildlife agencies can and should be fully empowered and authorized to facilitate the listing process. Areas of reform include:

a. Prelisting Data Collection and Reviews: State agencies have expertise in conducting population status inventories and geographic distribution surveys to facilitate review of which species should be advanced to the official proposed stage for listing consideration. The USFWS and NOAA Fisheries can and should avail themselves of this expertise by contracting with (or by use of other means) the States to provide these data and analyses.

b. Reliance on Sound Science: The threshold of what constitutes substantial information provided in a listing petition to warrant further consideration must be raised. The petitioner should be required to provide the data on which they are relying in the petition. The Services need broad flexibility to reject petitions lacking scientific basis.

c. Adequate Time Frames for Listing Decisions: The statutory time frames allowed for listing decisions are too short to provide for adequate information to be collected and analyzed. This causes a flawed decision making process precipitated by legal action. The Services should have flexibility to delay decisions, especially on species where there is little information with which to make a decision or in cases where major scientific studies are underway that will provide information for decision making.

d. Presumption for State Information: If a determination is made that substantial information is submitted with a listing petition, the Secretary should be required to provide all listing petitions to the appropriate State fish and wildlife agency or agencies for review. There should be a rebuttable presumption in favor of State information and recommendations on listing, which the Secretary should be required to refute through peer review if the Secretary disagreed with the State recommendation.

e. Exclusions of a State or Geographic Area in the Listing Process: The Act should provide greater flexibility to not list a distinct geographic area or State within the range of a species if it is receiving adequate management within that portion of its range. Providing geographic exclusions will ensure that States that have adequate management programs for rare species are not penalized for lack of effort or result elsewhere, and would provide an incentive for States to provide adequate management. Similarly, there should be greater flexibility to delist a distinct geographic area or State within the range of a species where ESA protections are no longer needed.

If. Joint Rule-Making and Decision Making Between the USFWS, NOAA Fisheries and the State Fish and Wildlife Agencies: State agencies have jurisdictional authority for species prior to listing, and share jurisdiction for species when listed and during post-delisting monitoring stage. Because of this co-equal role with the Federal agencies, State agencies should be given the choice to participate fully in petition evaluation, data review and rule-making processes, and be given an equal say in listing decisions. Decisions should be made on a consensus basis, whenever possible, by the State agencies, USFWS, and NOAA Fisheries. If the partners cannot agree on a listing decision, the respective Secretary of Interior and Commerce should make the final decision.

IV. De-Listing

Efforts to recover listed species must receive enhanced attention, at least concomitant with the attention given to listing. The Association suggests that additional focus and attention on recovery planning and achievement will lead to species population status commensurate with down- or de-listing. Legislative criteria linking the process to initiate down- or de-listing action to meeting objectives in approved recovery plans should be mandated. Incremental down- or de-listing by State or geographic population should proceed with much greater priority than it now receives. De-listing must be maintained and activated based solely on biology. To emphasize the importance of the de-listing process, funding for de-listing actions should be increased and receive a specific-line item within the appropriations provided for listing actions. Until the USFWS catches up with the backlog of listing proposals, de-listing actions too often get relegated to a low priority because of the process pressures and legal challenges with many listing petitions. This approach does not recognize the importance of acknowledging and rewarding accomplishments under the Act to building public support for the Act and the conservation programs carried out under it.

The Association advocates that the States be authorized to design and develop monitoring programs on de-listed species, with recognized (by the federal agencies) full legal responsibility for species conservation, and report annually to the Secretary during the five-year period on the status of the monitored species. Funds must also be provided to the States to conduct these monitoring and evaluation efforts.

V. Critical Habitat Designation

The Association advocates that critical habitat designation should occur concurrently with recovery planning, except when there is an urgent eminent threat to a significant amount of occupied habitat that would warrant designation at the time of listing. The Secretary should retain discretionary authority over when and whether or not to designate critical habitat, and not be under a statutory mandate to always designate critical habitat. State agencies should be equal partners with the Federal agencies in evaluating the need, planning, identifying areas, rule-making, and decision making processes for all critical habitat designations.

State fish and wildlife agencies have expertise, knowledge and data regarding a species extant and historic ranges, where it may now be extirpated, and which habitats might have the potential to facilitate species recovery. Habitats for recovery may include those that were historically occupied, if they are still capable of supporting the species; in the absence of such areas, non-occupied but potential habitat should be identified for recovery. Whether either or both kinds should be identified as “critical habitat” must be decided on a species-by-species basis. The Association recommends clarifying the regulatory implications of what constitutes “adverse modification of critical habitat” (discussed in the section on Prohibited Acts).

The Association recognizes the value of voluntary non-regulatory efforts of many landowners to protect, manage and restore habitats needed for recovery. Many landowners have implemented or are willing to commit to implement management programs that equal the biological protections of critical habitat. Providing these conscientious landowners with protections from the regulatory implications of critical habitat designations rewards their good acts and provides incentive for other landowners to do likewise. The Act provides that the Secretary has discretion to exclude areas for critical habitat designation, if the benefits of exclusion outweigh the benefits of designation. The Association recommends expanding the types and use of exclusions and institutionalizing them in policy and statute, including:

a. exclusion of all lands covered by a HCP, SCA, SHA, or other approved conservation plan from critical habitat designations;

b. exclusion of State lands that have protection equivalent to that provided by designation of critical habitat; which provide a net benefit to the species through protection and management of the land; and which have an effective management program;

c. exclusion of county and private lands under a cooperative management agreement between the State and the Service, another Federal agency, or private conservation organization or partnership that has protection equivalent to that provided by designation of critical habitat; provides a net benefit to the species through protection and management of the land; and which provides an effective management program;

d. exclusion for important Military training areas that have adequate Integrated Natural Resource Management Plans;

e. provide a stewardship incentive exclusion for state, county and private lands that would be voluntarily entered into conservation partnerships or some other form of management agreement;

f. automatic removal of critical habitat designations for all future HCPs, SCAs, and SHAs when approved by the Service according to standards that the plans or agreements achieve a net conservation benefit and have undergone public review.

VI. Recovery Plans/Recovery Teams

Once a species is listed, States must make every effort to address the factors that will result in recovery of the species and its ultimate delisting. The intent of the Act is to recover species, not just list them. The States can and must play a major role in recovery planning and implementation. State fish and wildlife agencies should always be given the opportunity to take the lead on recovery planning, or in the absence of an appointed recovery team or appropriate surrogate, to provide professional review of draft recovery plans prepared by a FWS or NOAA Fisheries staff or contractor. The utility of a team approach not only provides

for application of a broad base of knowledge and perspectives, but also better intergovernmental coordination regarding biological, social, economic and environmental factors. State fish and wildlife agency participation brings management expertise, practicality, and experience in working with both private landowners and local land use regulatory agencies (county Planning & Zoning agencies, for example), both of which are vital to success of recovery programs.

Recovery plans should present a number of recovery options that are technically feasible and will lead to species recovery and delisting. Different recovery options may have significantly different social, economic and environmental consequences. Statutory deadlines should be imposed on the agencies to produce a draft recovery plan no later than 2 years after listing, a final recovery plan not later than 3 years after listing, and a revision every 10 years. Recovery plans should:

a. identify jurisdictional responsibilities through implementation agreements;

- provide multiple recovery approaches that are technically feasible, as options for agencies to use to best meet social, economic, and environmental needs;

c. have the flexibility to provide short term interim management strategies for those species for which there is little information with which to develop a full recovery plan or when interim recovery strategies are the best approach to stabilize populations;

d. identify specific (i.e. quantified, measurable) population and habitat objectives that, when attained, trigger down or delisting;

e. include appropriately documented and credible justification for all goals, objectives, and implementation approaches;

f. identify habitat important for recovery of the species, designate (if appropriate) critical habitat for regulatory purposes; and provide an indication of important habitat factors necessary for the species - i.e., simple protection may not be the best course of action - recovery and maintenance may require habitat changes such as openings, diversity, early successional stages, etc.;

g. provide pro forma Section 7 approval for Federal agency and State agency actions that are consistent with recovery plans;

h. provide “short form” HCPs for private landowners for certain activities, and (where appropriate) exemption from Section 9 and 10 restrictions for others;

i. provide certainty to cooperating landowners regarding their fate under the ESA;

j. be exempt from NEPA, if comparable State process is satisfied; and

k. satisfy plan amendment requirements for ESA under NFMA, FLMPA and other Federal land management acts, if the proposed actions are consistent with the appropriate recovery plan.

VII. Distinction between Threatened and Endangered

The ESA distinguishes between “threatened” and “endangered” species, with the status of “endangered’ being subject to more protective regimes than “threatened”. Clearly, two separate categories were legislatively provided for in the Act for very definite and distinct purposes. Although threatened species are imperiled and at risk of becoming endangered, there is greater leeway for management flexibility and protections provided. The USFWS and NOAA Fisheries apply rules for protecting endangered species to threatened species as well, regardless of whether additional protections are warranted. The agencies or congress must reassert the distinction between these classifications in the Act, including greater application and involvement by the States in development of Section 4(d) rules allowing for management flexibility.

VIII. State Conservation Agreements, Candidate Conservation Agreements, Safe Harbor Agreements and Habitat Conservation Plans

The Association supports the use of state conservation agreements, candidate conservation agreements, safe harbor agreements, and habitat conservation plans. The State fish and wildlife agencies can provide contacts, expertise, and knowledge to contribute toward successful use of these tools in conserving listed

species and their habitats. The use and applications of these tools should be more fully clarified and understood by all agencies. State Conservation Agreements, Candidate Conservation Agreements, and Safe Harbor Agreements provide incentives to states and private landowners to invest in conserving rare species and in recovering species that are listed. They can remove the threat of future regulatory restrictions that are too often associated with listed species. Habitat Conservation Plans, in their limited application thus far, have already been used effectively to bring together affected and interested parties, to examine and agree on short-term objectives and long-term goals, and provide certainty to the recovery process while minimizing impacts on private lands and meeting the recovery needs of affected species. The Act should be amended to specifically include these as recovery tools.

IX. Certainty and Incentives for Private Landowners

Private landowners can play a major positive role in species recovery, if they are involved in the process early, given appropriate information on what they can and cannot do, and have certainty about the fate of their own land management practices under ESA. Most landowners want to be good stewards of their land. Most will work with fish and wildlife resources agencies, if they are approached with courtesy and respect, and sensitivity to their interests and plans. Federal agencies and States must do a better job of matching existing incentives (under several programs at all government levels, such as Farm Bill programs, the Landowner Incentives Program, and Private Lands Stewardship Program, etc.) with landowners who are interested in conservation. In return, Federal and State agencies need to assure landowners that, if they agree to certain habitat conservation measures, we will not require any more of them. This certainty must be assured for prelisting State Conservation Agreements, Safe Harbor Agreements, and Habitat Conservation Plans.

Several areas are ripe for providing additional monetary conservation incentives for private landowners including changes to inheritance tax law to remove the disincentive that forces the breaking up of large tracts of land to pay taxes; and establishment of a permanent statutory basis for the Landowner Incentive Program for fish and wildlife habitat conservation on private lands.

X. Prohibited Acts

The Association advocates that the USFWS and NOAA Fisheries clarify the standards they will apply in making a determination if alteration to habitat constitutes harm, and thus a “take” under Section 9 of the Act. Not all habitat actions lead to species decline; some disturbance, in fact, may be vital to recovery of species dependent on early successional stages.

The Act should be amended to affirm the current regulatory standard for prohibiting “destruction or adverse modification of critical habitat” for federal actions under the Section 7 process. The prohibition now applies if the “destruction or adverse modification of critical habitat” would jeopardize the continued existence of a listed or proposed species. The Association is concerned that a more restrictive standard, i.e. one that would prohibit any minor loss or adverse modification of critical habitat, would establish quasi-sanctuaries on state and private land and create regulatory grid-lock for many federal actions including those funding State programs. The Act needs to provide both adequate protection and flexibility to manage the quantity, quality and location of critical habitat for species recovery. The Association believes that as long as adequate mitigation is required in the Section 7 process to offset any minor loss or adverse modification of critical habitat, than the current “jeopardy” regulatory standard is appropriate.

XI. Funding

The Association supports enhanced appropriated funding for all aspects of the ESA. We realize the challenges faced by Congress in meeting all national needs. However, we strongly urge a re-focus of appropriated dollars so that Section 6 funding can be significantly increased, if necessary by reallocating non-traditional Section 6 granting funds. The amount available in recent fiscal years to States is both grossly inadequate, and not at all proportionate to the responsibility of the State fish and wildlife agencies for listed species. The amount of funding provided under the program has not grown in relation to increases in the number of listed species. In 1977, Congress provided $4.2 million for assistance to states to deal with 194 listed species. In 2002, the number of listed species (1,263) was more than six times as large, yet Congress provided just $7.52 million for assistance to States. This represents a decline in real support for this program, when adjusted for inflation. We also suggest that as States assume a greater lead in administering the ESA, Congress should redirect other Federal appropriations now going to USFWS and NOAA Fisheries to the States for funding implementation of the Act.

At the same time, we believe that existing funding must be more effectively spent, and alternative-funding sources should be fully explored. The Association suggests that continuing to spend substantial money on species that are essentially recovered, at least in part of their range (such as the bald eagle), should be from sources other than those available under the ESA. The USFWS, NOAA Fisheries, and State fish and wildlife agencies all need to explore processes for assigning funding to listed species to ensure that those in the most significant need of recovery attention (and not just those that are the most charismatic) are addressed first.

Finally, the Association reemphasizes that it is vitally important to secure funding (separate from ESA) for the States to provide support for conservation programs for nongame fish, wildlife and their habitats in order to facilitate a conservation safety net before it is necessary to impose the ESA to prevent species extinction. This preventive management makes good biological and economic sense.

The Association's Teaming With Wildlife initiative, and other wildlife diversity funding programs that build on the tremendously successful Pittman-Robertson and Wallop-Breaux user pay-user benefit programs for wildlife and sportfish, would provide new reliable sources of funding for State programs. These funds should be allocated to the States for conservation, recreation and education programs relating to fish and wildlife and their habitats. If we can address the limiting factors causing a species decline before they reach a stage where the ESA is the only protection against extinction, we can employ a series of voluntary, non-regulatory approaches that provide more flexibility and creativity for conservation programs with private landowners and other jurisdictional entities.

Document IAFWA Position on ESA Reform.20040930.doc